



July 9, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-2929

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149185.

The Texas Department of Human Services (the "department") received a request for "all available documents in the Facility Master Files" regarding Phoenix Home Health Care Systems, Inc. for a specified period. You acknowledge that the department failed to timely submit to this office written comments stating why the stated exceptions apply that would allow the information to be withheld, as well as a copy of the specific information requested, or representative samples, in accordance with the requirements of the Public Information Act. *See Gov't Code § 552.301(e)(1)(D)*. You also acknowledge that because the department failed to properly comply with all of the requirements of section 552.301, the information responsive to the request is presumed to be subject to required public disclosure and must be released absent a compelling reason to withhold the information. *See Gov't Code § 552.302*. You contend, however, that the documents you have submitted for our review consist of or contain information that must be withheld under section 552.101 of the Government Code in conjunction with various statutory confidentiality provisions.¹ We

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 encompasses information protected by statute. This office has long held that a compelling reason exists to overcome the section 552.302 presumption of openness if the information at issue is made confidential by another source of law. *See, e.g., Open Records Decision No. 26 (1974)*. We therefore address the department's section 552.101 assertions.

assume that you have released to the requestor the information that is responsive to the request, other than the documents you have submitted for our review.

You assert that some of the submitted information is made confidential by section 142.009(d) of the Health and Safety Code. Chapter 142 of the Health and Safety Code contains provisions pertaining to the regulation of home health services. Section 142.009(c) requires the department to investigate "each complaint received regarding the provision of home health, hospice, or personal assistance services[.]" Section 142.009(d) provides:

The reports, records, and working papers used or developed in an investigation made under this section are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule;
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency;
- (6) on a form required by a federal agency if:
 - (A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;
 - (B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and
 - (C) the release of the information complies with any other federal requirements

The information you have provided indicates that some of the submitted records you seek to withhold constitute reports, records, and working papers that were used or developed during

an investigation made under section 142.009(d). Based upon our understanding that there has been no consent for release and that no other exception to confidentiality is applicable in this instance, we agree that the submitted intake worksheets, complaint reports, and reports of contact, which you have labeled Attachment C, are confidential in their entirety.

The submitted records also include copies of HCFA 2567 forms, which you have marked as Attachment D. You seek to withhold certain information contained in the forms, which you have highlighted. Federal regulations require the department to release completed HCFA 2567 forms containing a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). We agree that the information you have marked constitutes information identifying individual patients, physicians, other medical practitioners, or other individuals as contemplated above. We further agree that the signature of the agency representative on the forms, together with the agency representative's comments, indicate that the provider had a reasonable opportunity to review the report and offer comments. The department therefore must redact the marked information from the HCFA 2567 forms prior to their release.

The submitted information also includes a form titled "Statement of Deficiencies and Plan of Correction", which you have marked as Attachment E. This form is apparently developed by the department and identifies deficiencies found. Prior to release of this form, you must redact information that identifies any person, other than the home and community support services agency, as provided under section 142.009(d)(5) of the Health and Safety Code.

You further assert that a portion of the information contained within the state form is excepted from required disclosure under section 159.002 of the Texas Occupations Code, the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides in pertinent part:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We believe that the information you have marked on the state form is information covered by section 159.002, and must be withheld. We have also marked additional information on the state form which you did not highlight, but which must be withheld under section 159.002.

You state that Attachment F consists of documents which the department has already released to the requestor, but with social security and driver's license numbers redacted. You cite no provision of law in support of withholding the social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Additionally, you have indicated that the documents contain driver's license numbers. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers under section 552.130.

In summary, we agree that a portion of the information at issue is excepted from disclosure under section 552.101 as provided above. The department must withhold Attachment C in its entirety. Attachments D, E and F are subject to release to the requestor, but the

department must redact from these documents prior to their release the confidential information which you highlighted in D and E, and which we have marked in E and F.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

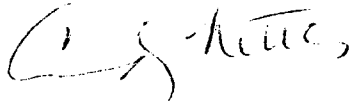
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 149185

Enc. Submitted documents

c: Ms. Sarita Kidd Cooper, CLA
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(w/o enclosures)